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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MANUEL LARIOS MUNOZ,

Defendant and Appellant.

B280934

(Los Angeles County
Super. Ct. No. BA436670)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mildred Escobedo, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Manuel Larios Munoz of first degree burglary, forcible rape, forcible oral copulation, sexual penetration by a foreign object, and assault with the intent to commit a felony, arising out of his attacks on two different victims. Munoz argues that his convictions for burglary and assault, as well as the jury’s true findings on certain “One Strike” allegations (Pen. Code, § 667.61),¹ must be reversed because his trial counsel provided ineffective assistance by failing to request that the jury be instructed on voluntary intoxication. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

a. *People’s evidence*

Viewed in the light most favorable to the judgment (*People v. Johnston* (2003) 113 Cal.App.4th 1299, 1303–1304), the evidence relevant to the issues presented on appeal was as follows.

(i) *Offenses against Veronica O.*

On April 17, 2015, Veronica O. visited the Eastside Luv bar in Los Angeles. She left the bar at approximately 2:00 a.m. and walked back to her car, which was parked nearby. Veronica remained in her car for some time, texting her ex-boyfriend and another friend. Suddenly, Munoz—whom Veronica did not know—entered the vehicle’s front passenger side and pushed Veronica, causing her to hit her head against the door. Munoz smelled “awful,” “like trash.” Veronica said, “Don’t hurt me.” Munoz mumbled something like, “I’ve done this, I’ve gotten

¹ All further undesignated statutory references are to the Penal Code.

away.” Veronica screamed, and Munoz climbed on top of her and used his elbow to push her between the front seats. Munoz tried to kiss her, punched her in the head, choked her, clawed at her face, covered her mouth with his hand, and pulled her hair. He pulled her pants down below her hips and tried to touch her vaginal area. Veronica said, “ ‘You are not going to rape me,’ ” which upset Munoz, and he choked her. Veronica grabbed Munoz’s testicles and squeezed as hard as she could, and scratched at his eyes. As she attempted to break free, Veronica felt a sharp object pressed against her neck. After a fierce struggle, Veronica managed to free herself. She fell out of the car and onto the ground, ran across the street to a house on the corner, and knocked on the door. No one answered, so she ran back to the Eastside Luv bar. She told a friend in the bar that she had been assaulted. The friend and two other bar employees accompanied Veronica back to her car, where she discovered her purse and cellular telephone were missing. A security officer who worked for a nearby medical center called 911 for Veronica.

Veronica told an officer who responded to the call that a man had assaulted and tried to rape her, and provided his description. A folding knife and a metal necklace that did not belong to Veronica were found in her car. On the ground just outside the car was a black cap that the assailant had worn.

Veronica underwent a sexual assault response team (S.A.R.T.) examination. She had multiple abrasions, scratches, contusions, swollen areas, and lacerations, and experienced pain and tenderness in her face, neck, legs, head, back, arms, and genital region. Petechiae were present in one of her eyes, indicating choking.

(ii) *Offenses against Maria S.*

Maria S. lived alone in a bungalow behind the house to which Veronica had run for help, directly across the street from where the attack on Veronica occurred.

On May 14, 2015, Maria went to bed at approximately 9:00 p.m. She had been ill and nauseous all day. Before retiring she ensured the doors were locked; she had checked the windows the previous day. She turned on a dim lamp in her bedroom, closed the door that led to the living room, and went to sleep.

Shortly after midnight, Maria awoke to find her bedroom door open and Munoz—whom she did not know—standing at the foot of her bed, clad only in briefs and a rosary necklace. She screamed. Munoz jumped on top of her on the bed, held her down, covered her mouth with his hand, and told her to shut up and stay put. She struggled with Munoz, pleaded with him not to hurt her, and offered him money and her belongings if he would just leave. Munoz told Maria he did not “want any of that. He was just there to have sex.” She told him she wanted him to leave because she was sick and felt nauseous. Munoz sarcastically said that was sad, and that he would take care of her. Munoz fondled Maria’s body under the sheets and removed her pants and underwear. Maria struggled with him, squeezed his genitals as hard as she could, and kicked him. She attempted to choke him with the rosary he was wearing, but it broke. Munoz became angry. He dug his elbow into her chest, kicked her, and choked her. During the struggle, Munoz kept saying, “ ‘I just wanna have sex.’ ” Afraid Munoz would kill her, Maria ceased struggling. Munoz bit her, kissed her neck, mouth, and breast, inserted his fingers into her vagina, orally copulated her, and vaginally raped her. Maria told him that he had gotten what

he wanted and needed to leave. Munoz said he had not meant to hurt her, he knew what he did was wrong, and asked her to forgive him. He retrieved his clothing, which was lying right outside the bedroom door, and got dressed. As Munoz was walking to the front door, he stated he had forgotten something. He returned to the bedroom, pulled a two-foot long machete from the floor near the bed, and put it down his pant leg. He then left Maria's residence.

Maria discovered that her living room window had been propped open with a piece of wood. She called 911, briefly spoke to officers, and underwent a S.A.R.T. examination. Among other things, Maria suffered multiple bruises, a "knot" on her head, and vaginal abrasions as a result of the assault.

(iii) *The investigation and DNA evidence*

Veronica initially identified a man other than Munoz as her attacker, partly because he had injuries to his eyes and face, and Veronica believed she had injured the assailant.

A forensic sketch artist prepared a composite sketch of Maria's assailant. It, and a press release, was provided to the media. On May 21, 2015, officers, acting on a citizen tip, discovered Munoz living in a transient encampment under the 101 Freeway overpass near Maria's residence and the Eastside Luv bar. A machete, a pair of shoes, and a "hoodie" sweatshirt were in Munoz's sleeping area.

A detective interviewed Munoz, and Munoz voluntarily provided a DNA sample. Because the detective could not reach Maria, Munoz was released.

Subsequently, Maria identified Munoz as the rapist in a six-pack photographic lineup, and in a field show up. Maria also

identified the machete, the hoodie, and the shoes as similar to the items the attacker had at her house.

DNA profiles taken from Veronica's neck, breast, hand, and fingernails, from the hat and knife found in or near Veronica's car, and from Maria's vaginal swab, matched appellant's DNA profile. The chance of another unrelated individual matching the profiles was one in two quintillion.

b. *Defense evidence*

Munoz testified on his own behalf.

He denied attacking Veronica or forcing his way into her car. According to Munoz, Veronica approached him as he was sitting in a plaza and asked what she could do to get some drugs. It appeared she had been drinking. He told her he had some "very good" crystal methamphetamine. At Veronica's suggestion, they went to her car, where he divided the methamphetamine into lines with his knife, and she ingested it through a straw; then he ingested some. She kissed him and grabbed his penis. Suddenly, Veronica began hitting and scratching him. He grabbed her hands, pushed her down on the car seat, and told her to calm down. She kept fighting and hitting him, so he slapped her face twice. Munoz fled from the car, but she followed, still hitting him. He accidentally left his hat and knife in the car.

Munoz also denied attacking and raping Maria. According to him, he met Maria at a bar in 2014. They drank and danced for several hours. He walked her home and spent the night with her. He saw her on three additional occasions, during which they ate dinner together, danced, or went to her house. Munoz believed he was developing a dating relationship with her. On the night of the incident, Munoz called Maria and she invited him to her house. They hugged and kissed and talked in the bedroom.

When she said she was sick, he said he would take care of her. He brought his machete with him because he was afraid of being killed by “gangsters.” He placed it under the bed because Maria said she did not want weapons in her house. He orally copulated Maria, and they had consensual intercourse. When he got up to leave, she refused to talk to him or kiss him and seemed “different.” Munoz believed this was because they had argued earlier that evening about his failure to repay \$2,000 she had lent him. She threatened to have him arrested.

After his arrest, Munoz wrote a note addressed to “Linda,” asking her to forgive him if he had hurt her. He was apologizing for the “problems over money,” not for raping her. In regard to the rape accusation, he stated in the note, “If I did so I did it, perhaps, because I was drunk or on drugs.” He told her “that we had a future ahead of us to live for” and that he loved her.

c. Rebuttal evidence

Police detectives conducted several recorded interviews with Munoz. He initially denied knowing Veronica. When confronted with the DNA evidence linking him to the crime, he said Veronica had approached him and suggested they engage in consensual sexual relations in her car. She was injured when she fell on the vehicle’s floor.

Munoz gave a variety of conflicting stories regarding his contact with Maria, including that she was a prostitute named “Lizette,” whom he had paid for sex on previous occasions. Eventually, he confessed to raping her. He explained that she did not know him, but he had been watching her for a month. He had gained access to her house from a crawl space beneath. On an almost daily basis, he entered the house and watched her sleep. He would also watch her bathe from underneath the

floorboards. On the night of the rape, he entered the house through an unlocked front door. He spent approximately an hour sitting on Maria's living room couch and eating her food. He took off his clothes, and entered the bedroom with the intent to watch her sleep.² However, she woke up and screamed, so he jumped on top of her. When she grabbed his testicles during the struggle, he experienced an erection, "couldn't resist the temptation," and forced her to have sex. Had Maria not awoken, he would not have raped her.

2. Procedure

As to the crimes against Maria, the jury convicted Munoz of first degree burglary (§ 459), forcible rape (§ 261, subd. (a)(2)), forcible oral copulation (former § 288a, subd. (c)(2)(A)), and sexual penetration by a foreign object (§ 289, subd. (a)(1)(A)). The jury found that a person, other than an accomplice, was present in the residence during the commission of the burglary; that Munoz was personally armed with a deadly weapon during commission of the three sexual offenses (§ 12022.3, subd. (b)); and that the sexual offenses were committed during commission of a burglary (§ 667.61, subds. (a), (d)). The jury convicted Munoz of assaulting Veronica with the intent to commit a felony, i.e., rape, sodomy, or oral copulation (§ 220, subd. (a)(1)), and found Munoz personally used a deadly and dangerous weapon, a knife, during commission of the offense (§ 12022.3, subd. (a)).

² He also stated he wanted to steal a pair of Maria's shorts so he could walk by her house wearing them, in hopes of striking up a conversation with her.

The trial court sentenced Munoz to 46 years to life in prison.³ It imposed a restitution fine, a suspended parole revocation restitution fine, a court operations assessment, a criminal conviction assessment, and a sexual offender program fund fee. Munoz timely appealed.

DISCUSSION

Munoz has not shown that his counsel provided ineffective assistance by failing to request that the jury be instructed on voluntary intoxication

To establish the burglary and the assault offenses (counts 1 and 5), as well as the “One Strike” allegations (§ 667.61), the People were required to prove Munoz’s specific intent. To prove both the burglary as alleged, and the section 667.61 allegations, the People had to establish that, when Munoz entered Maria’s bedroom, Munoz intended to commit a sexual offense, i.e., forcible rape, forcible oral copulation, or sexual penetration. (See §§ 459, 667.61, subd. (d)(4); see generally *People v. Harris* (2013) 57 Cal.4th 804, 842.) To prove the assault as alleged, they likewise had to show Munoz intended to commit one of these sexual offenses when he assaulted Veronica. (§ 220, subd. (a)(1).)

³ The trial court configured the sentence as follows: for the forcible rape (count 2), 25 years to life, plus five years for the arming enhancement; and for the assault (count 5), the upper term of six years, plus a 10-year dangerous weapon use enhancement, to be served consecutively to the term imposed on count 2. The court imposed sentences of 30 years to life on the forcible oral copulation and sexual penetration convictions (counts 3 and 4), to run concurrently with the sentence in count 2. For the burglary (count 1), the court imposed one-third of the midterm, i.e., 16 months, stayed pursuant to section 654.

Munoz’s trial counsel did not request, and the trial court did not give, an instruction on voluntary intoxication, such as CALCRIM No. 3426.⁴ Munoz avers that trial counsel’s failure to request such an instruction requires reversal of his convictions for burglary and assault, as well as the true findings on the One Strike allegations. We disagree.

1. *Applicable legal principles*

A meritorious claim of constitutionally ineffective assistance must establish both that counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms, and that the defendant was prejudiced by counsel’s failings. (*People v. Homick* (2012) 55 Cal.4th 816, 893, fn. 44; *People v. Johnson* (2016) 62 Cal.4th 600, 653; *Strickland v. Washington* (1984) 466 U.S. 668, 687.) If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails. (*People v. Holt* (1997) 15 Cal.4th 619, 703.) “ ‘If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation.’ ” (*People v. Gamache* (2010) 48 Cal.4th 347, 391;

⁴ The standard version of CALCRIM No. 3426 provides in pertinent part: “You may consider evidence, if any, of the defendant’s voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted [or failed to do an act] with” the requisite intent. “You may not consider evidence of voluntary intoxication for any other purpose. [Voluntary intoxication is not a defense to <insert general intent offense[s]>.]”

People v. Johnson, at p. 653.) Our review of counsel’s performance is highly deferential. (*People v. Hinton* (2006) 37 Cal.4th 839, 876.) We defer to counsel’s reasonable tactical decisions, and presume counsel acted within the wide range of reasonable professional assistance. (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) Counsel “has wide discretion in choosing the means by which to provide constitutionally adequate representation.” (*People v. Johnson*, at p. 653; *People v. Duncan* (1991) 53 Cal.3d 955, 966 [there are “‘countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way’”].) To establish prejudice, “defendant bears the burden to show a reasonable probability that, but for his trial counsel’s errors, the result would have been different. [Citation.] A reasonable probability is one “‘sufficient to undermine confidence in the outcome.’” [Citation.]” (*People v. Olivas* (2016) 248 Cal.App.4th 758, 770.)

Evidence of voluntary intoxication is “‘admissible solely on the issue of whether or not the defendant actually formed a required specific intent[.]’” (*People v. Roldan* (2005) 35 Cal.4th 646, 715, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; § 29.4, subds. (a), (b); *People v. Olivas, supra*, 248 Cal.App.4th at pp. 770–771.) The instruction is not required simply because the evidence shows the defendant ingested drugs or alcohol. (*People v. Ivans* (1992) 2 Cal.App.4th 1654, 1661–1662.) “Accordingly, a defendant is entitled to an instruction on voluntary intoxication ‘only when there is substantial evidence of the defendant’s voluntary intoxication and the intoxication affected the defendant’s “actual formation of specific intent.”’ [Citation.]” (*People v. Roldan*, at p. 715; *People*

v. Verdugo (2010) 50 Cal.4th 263, 295; *People v. Williams* (1997) 16 Cal.4th 635, 677; *People v. Olivas, supra*, at p. 771.) Evidence merely of “some impairment” unaccompanied by evidence of the effect of the defendant’s alcohol consumption on his state of mind does not constitute substantial evidence warranting giving an intoxication instruction. (*People v. Marshall* (1996) 13 Cal.4th 799, 848.) An instruction on the significance of voluntary intoxication is a pinpoint instruction that the trial court is not required to give sua sponte. (*People v. Verdugo*, at p. 295; *People v. Olivas*, at p. 770.)

2. *Munoz has failed to establish ineffective assistance of counsel*

Here, Munoz fails to establish either prong of his ineffective assistance claim.

The record suggests defense counsel had valid tactical reasons for not requesting a voluntary intoxication instruction. First, the evidence Munoz was actually intoxicated when he committed the crimes was scant and contradictory. Munoz testified, or told detectives, that he frequently used drugs and alcohol in April and May of 2015. However, he stated he was not high when he encountered Veronica because he had not yet consumed the methamphetamine he had purchased that day. Maria testified that she smelled alcohol on Munoz when he raped her, and Munoz testified he had been “drinking a little” before the incident. Munoz also hypothesized that Maria fabricated rape charges because she was angry he purportedly could not sustain an erection due to his drug use; he also wrote the note stating that “if” he committed the rape, “perhaps” it was because he was drunk and on drugs. However, when Munoz left Maria’s residence after the rape he walked without difficulty or apparent

impairment. And, he told detectives he had not used methamphetamine since his return to the United States from Honduras. In short, there was no persuasive evidence that Munoz was actually intoxicated when he committed the attacks.

Entirely lacking was any evidence showing the effect of drug or alcohol consumption on Munoz's state of mind. An "intoxication instruction is not required when the evidence shows that a defendant ingested drugs or was drinking, unless the evidence *also* shows he became intoxicated to the point he failed to form the requisite intent or attain the requisite mental state." (*People v. Ivans, supra*, 2 Cal.App.4th at p. 1661; *People v. Williams, supra*, 16 Cal.4th at p. 677 [defendant is entitled to a voluntary intoxication instruction only when there is, in addition to substantial evidence of his voluntary intoxication, substantial evidence that the intoxication affected his actual formation of specific intent].) There was no such evidence here. Instead, there was overwhelming evidence to the contrary. Munoz acted with purposeful determination when he attacked Veronica. Munoz's conduct in regard to Maria demonstrated planning. He entered Maria's house through a window, quietly enough not to awaken her; brought a machete; and undressed before she awakened, actions strongly suggesting he formed the intent to commit the sexual offenses before entering the house, despite any intoxication. (See, e.g., *People v. Williams*, at pp. 677–678 [despite defendant's statements that he was "doped up" and "smokin' pretty tough," instruction was unwarranted because there was no evidence that voluntary intoxication affected his ability to formulate intent]; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1181 [evidence that defendant drank 8 to 10 beers was insufficient to require an intoxication instruction, because there

was no evidence his drinking had any “noticeable effect on his mental state or actions”]; *People v. Marshall, supra*, 13 Cal.4th at p. 848 [evidence that the defendant had an unspecified number of drinks over a period of hours and seemed “dazed” did not support conclusion he was unable to premeditate or to form an intent to kill]; *People v. Ivans, supra*, at p. 1662 [where the defendant gave a detailed account of events, instruction was unwarranted].)

Second, even assuming *arguendo* that sufficient evidence existed, counsel had obvious tactical reasons for deciding to forgo a voluntary intoxication defense. (See *People v. Olivas, supra*, 248 Cal.App.4th at p. 770 [deficient performance is rarely shown if there was a tactical reason for trial counsel’s conduct].) As to Veronica, counsel could reasonably conclude the jury would reject any theory that Munoz lacked a sexual intent. The evidence showed that immediately after entering the car, Munoz attacked Veronica, attempted to kiss her, and partially pulled down her pants. He also made a statement suggesting he had committed a similar act or acts before and “gotten away” with it. These facts overwhelmingly suggested a sexual intent. There was no contrary evidence. There was no delay between Munoz’s entry into the car and the attack. There was no evidence showing any other reason for his actions. There was no event or circumstance from which the jury could have inferred Munoz had any other intent, either when he entered the car or thereafter.

Given this paucity of evidence, counsel reasonably chose to defend on the most promising theory available to the defense: that, based on Munoz’s trial testimony, he committed no crime against Veronica. Munoz’s story was that he and Veronica ingested methamphetamine together, at which point she went “crazy” and attacked him. To bolster this theory, counsel pointed

to discrepancies in Veronica's statements: she misstated the time she left the bar, and she told a detective and the S.A.R.T. nurse that Munoz pushed her into the car from outside it, in contrast to her trial testimony that she was inside the car when he unexpectedly entered. Counsel also argued that Veronica's account was unbelievable because the car was too small for her to have been pinned between the seats, as she described, and her DNA was not found on the knife blade. Based on the foregoing, counsel argued that Veronica was a liar and Munoz's account was more credible.

Given counsel's reasonable tactical choice, counsel did not perform inadequately by declining to pursue a voluntary intoxication theory. Counsel reasonably could have concluded that injecting the issue of voluntary intoxication into the defense theory would have simply muddied the waters. As *People v. Olivas* explained: "The primary defense theory at trial was that defendant had not committed the crimes of which he was accused." (*People v. Olivas, supra*, 248 Cal.App.4th at p. 771.) A request for a voluntary intoxication instruction "would have been inconsistent with the primary defense theory that no misconduct occurred. Requesting an instruction on voluntary intoxication would have implied that defendant committed the sexual misconduct but that he was not criminally liable for his conduct because his intoxication negated the specific intent necessary to convict him As that argument is wholly inconsistent with the primary defense theory . . . trial counsel had a tactical reason for not requesting a voluntary intoxication instruction." (*Ibid.*)

The same is true as to the crimes against Maria. As with Veronica, counsel was faced with overwhelming evidence in the form of Maria's highly credible testimony, the DNA evidence, and

evidence of Maria's injuries. Munoz entered Maria's house uninvited in the middle of the night, brought a machete, took off his clothing outside Maria's room, rejected Maria's offers of money to induce him to leave, and repeatedly stated, " 'I just wanna have sex.' " Additionally, he had attempted to rape Veronica a month earlier in the same neighborhood. Given this evidence, the jury was unlikely to agree that because of his purported intoxication, he was not able to form the intent to commit sex crimes until *after* he entered the house and Maria's room.

Instead, counsel argued that if the jury credited Munoz's confession, it should also credit Munoz's statements therein that he initially entered Maria's residence and room only intending to watch her sleep, not to rape her. This was a reasonable tactical choice. In many respects, Munoz's confession was consistent with Maria's account. Further, although it is not clear whether Munoz had actually, and surreptitiously, entered Maria's house before, Maria's testimony lent some credence to the defense theory. She testified that she was "pretty sure" Munoz had been watching her for a long time, and she was surprised by the fact he knew how to open her doors easily, "like if he had been in there before." Had counsel attempted to argue a voluntary intoxication theory, on the other hand, he risked undermining the defense he chose to put forth. (See *People v. Olivas*, *supra*, 248 Cal.App.4th at p. 771.) In short, counsel was faced with overwhelming evidence and few viable defense options. This, however, was not due to counsel's failings but instead was a consequence of Munoz's conduct and the People's evidence.

Finally, for the foregoing reasons, Munoz has also failed to establish the prejudice prong of his ineffective assistance claim.

The evidence against Munoz—including the DNA evidence, the victims’ testimony, their physical injuries, and his own statements to detectives—overwhelmingly proved his guilt. The evidence his purported intoxication had any effect on his formation of the requisite intent was negligible, for the reasons we have discussed. No reasonable jury would have concluded he lacked the intent to sexually assault the victims when he attacked Veronica and entered Maria’s house. Thus, even if the trial court had instructed on voluntary intoxication, there is no likelihood the jury would have rendered a more favorable result for Munoz.

DISPOSITION

The judgment is affirmed.

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REPORTS**

EDMON, P. J.

We concur:

EGERTON, J.

DHANIDINA, J.